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No. 05-908 and 05-915

IN THE
SUPREME COURT OF THE UNITED STATES

PARENTS INVOLVED IN COMMUNITY SCHOOLS,
Petitioner,

v.

SEATTLE SCHOOL DISTRICT NO. 1, *ET AL.*,
Respondents.

CRYSTAL D. MEREDITH, CUSTODIAL PARENT AND NEXT FRIEND OF JOSHUA RYAN MCDONALD,
Petitioner,

v.

JEFFERSON COUNTY BOARD OF EDUCATION, *ET AL.*,
Respondents.

On Writs of Certiorari to the United States Courts of Appeals for the Ninth and Sixth Circuits

BRIEF OF REP. JIM McDERMOTT ET AL. AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF THE AMICI CURIAE

This brief is submitted on behalf of individual Members of the United States House of Representatives as *amici curiae* in support of respondents in Nos. 05-908 and 05-915.[1] For many years, Congress has enacted numerous statutes aimed in varying ways at encouraging local school boards to establish and maintain racially integrated public schools. Prior to this Court's landmark decision in *Brown v. Board of Education*, 347 U.S. 483 (1954), many school districts maintained racially segregated schools that the Court in *Brown* determined once and for all violated the 14th Amendment to the Constitution. For too many years after *Brown*, dismantling racially segregated school systems and replacing them with integrated school systems generally was achieved only as a result of litigation and judicial decree and often in the face of strong resistance.

Gradually, Congress came to realize that ending the discredited system of school segregation and bringing about the 14th Amendment's promise of integrated public education could not be left to the courts alone. As a result, Congress enacted a series of laws that declared racially integrated public schools to be a paramount national policy and established various incentives whose purpose was to encourage local school districts to voluntarily integrate their schools. This national policy properly defers to the expertise of local school officials in establishing and maintaining racially integrated schools. Petitioners' challenges to the Seattle and Jefferson County, Kentucky (metropolitan

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[1] A list of the individual Members of Congress joining in this brief is included in the appendix to this brief. Pursuant to Rule 37.6 of the Rules of this Court, no counsel for a party in either case authored this brief in whole or in part. No person or entity other than the *amici* and their counsel made a monetary contribution to preparation or submission of this brief. The parties in both cases have lodged universal letters of consent with the Clerk of this Court for the filing of briefs *amicus curiae*.

Louisville), plans for maintaining integrated school systems threaten to undermine the statutory policy to encourage localities to foster school integration on a voluntary basis.

The *amici* Members of Congress join in this brief to inform the Court that the Congress strongly supports local school board efforts to achieve fully integrated public schools at the elementary and secondary school levels. We urge the Court to uphold these locally-initiated voluntary school choice programs aimed at providing the students of these communities the educational benefits of racial diversity and the assurance that no student suffers from the educational barriers that result from racial isolation. As Members of Congress committed to promoting equal opportunity for all students at the elementary and secondary school levels, the *amici* have a substantial interest in protecting 35 years of consistent congressional enactments promoting voluntary school integration.

INTRODUCTION & SUMMARY OF ARGUMENT

Petitioners and their *amici*[2] assail the voluntary actions of the local school authorities in Seattle and Louisville because both school districts, in their multifaceted school assignment programs, have taken race into account in one of the steps for assigning students to particular schools. It is hardly surprising that programs aimed at achieving and maintaining racial integration in communities where the housing pattern is highly segregated will need to consider race as part of the school assignment program. *See Parents Involved in Community Schools v. Seattle School District No. 1*, 426 F.3d 1162, 1177 (9th Cir. 2005) (en banc) (describing

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[2] For ease of identification, we refer in this brief to the petitioner in No. 05-908 by the acronym "PICS" and to the Solicitor General's *amicus curiae* brief in that case as "S.G. PICS Br.". In No. 05-915, we refer to the petitioner by the name "Meredith" and to the Solicitor General's *amicus curiae* brief in that case as "S.G. Meredith Br.".

the Seattle Plan as "striv[ing] to ensure that patterns of residential segregation are not replicated in the District's school assignments.").[3] Relatively few students are actually affected by a race-based assignment. According to the Ninth Circuit, roughly 300 out of 3000 students entering Seattle high schools in 2000 were assigned to four oversubscribed schools out of ten high schools citywide. *Id.* at 1170 & n.6, 1183 n.24. The following year, after the race-based tiebreaker was modified, only three schools were affected by the racial factor. *Id.* at 1170 n.7. Similarly, in Louisville, more than 95% of all elementary school students received their first or second choice school within a nearby cluster of schools. *JCPS*, 330 F. Supp.2d at 845 n.18. In both jurisdictions, student and parental choice and proximity to residence have a far greater effect in determining the students' assignments. *PICS*, 426 F.3d at 1185; *JCPS*, 330 F. Supp. 2d at 842-43.

A. Petitioners object to race playing virtually any role in school assignments. *See* PICS Br. at 21, 25; Meredith Br. at 6.[4] They go so far as to challenge the legitimacy of local school officials relying on racial diversity and avoiding racially isolated schools as compelling governmental interests. PICS Br. at 34-36; Meredith Br. at 4, 6. Their blanket condemnation of even partial reliance on race in

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[3] To simplify citation to the lower court opinions in these cases, we refer to the Seattle case as "*PICS*" and to the Louisville case as "*JCPS*." Furthermore, because the Sixth Circuit's decision (416 F.3d 513 (2005)) was a *per curiam* affirmance of the District Court's judgment based on its opinion, references to the lower court decision in *JCPS* will generally be to the District Court opinion (330 F. Supp. 2d 834 (W.D. Ky. 2004)).

[4] Petitioner Meredith argues that "race must solely be a plus factor not the dominant factor in any type of race-conscious plan utilized by the JCPS." Meredith Br. at 6. That is precisely what the District Court found to be the case. Race is just one of several factors affecting school assignments, the predominant factors being "residence, school capacity, program popularity, random draw and the nature of the student's choices . . . ." *JCPS*, 330 F. Supp. 2d at 842.

student assignments absent judicial remedial measures overlooks the fact that this Court upheld a voluntary school desegregation plan in 1971 that "properly took into account the race of its elementary school children in drawing attendance lines." *McDaniel v. Barresi*, 402 U.S. 39, 41 (1971). School officials must be accorded discretion in assigning students to particular schools to achieve racial integration whether the action is a response to judicial decree, congressional policy, or the judgment that the educational benefits of integration merit the highest priority in the community. The plans adopted by the Seattle and Louisville school officials reasonably respond to the difficult challenge of maintaining integration in the face of segregated housing patterns.

In upholding the Seattle and Louisville voluntary plans, the lower courts faithfully applied the principles of strict judicial scrutiny "to 'smoke out' illegitimate uses of race" masquerading as benign classifications. *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003) (quoting *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (plurality opinion)). After a thorough and searching judicial inquiry, those courts satisfied themselves that the school-assignment plans were narrowly tailored to further the compelling governmental interest of maintaining integrated schools, providing a racially diverse educational environment, and avoiding racial isolation of minority students. *PICS*, 426 F.3d at 1172-73; *JCPS*, 330 F. Supp.2d at 848-49. It is not only true that the lower courts had ample evidence to support the local school boards' assertion that these interests are compelling governmental interests, but more important, Congress has spoken directly to the question. In a series of statutes enacted since 1972, Congress has repeatedly enacted into law a national policy supporting racial integration of public schools, student diversity at the earliest stage of education, and preventing minority group isolation. *See* Emergency School Aid Act, Pub. L. No. 92-318, 86 Stat. 354 (1972); Magnet Schools

Assistance Program, Pub. L. No. 98-377, 98 Stat. 1299 (1984); No Child Left Behind Act, Pub. L. No. 107-110, 115 Stat. 1394 (2002), 20 U.S.C. §§ 6301 *et seq.* Each of these statutes expressed as national policy the government's interest in public school integration and provided incentives for local school board compliance. Implementation details were left to local officials.

B. The courts below took this Court at its word that strict scrutiny is not "strict in theory, but fatal in fact." *PICS*, 426 F.3d at 1172 (internal quotation marks omitted) (quoting *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 237 (1995)). Their analyses were obviously influenced by this Court's guidance that "[a]lthough all governmental uses of race are subject to strict scrutiny, not all are invalidated by it" and that "[c]ontext matters when reviewing race-based governmental action under the Equal Protection Clause." *Id.* at 1173 (quoting *Grutter*, 539 U.S. at 326-27); *see also JCPS*, 330 F. Supp.2d at 849-50. In upholding the Seattle and Louisville plans, the lower courts recognized that race is simply a plus factor in a multi-step process in which student choice was dispositive in the vast majority of assignments. The racial composition of each school was to reflect the racial population of the entire school district with approximately a 15% margin of acceptability on either side of the district-wide breakdown. No fixed number of positions is reserved for minority students. Race becomes a factor in school assignments only at the margins where racial isolation would result if school officials failed to act.

C. Finally, despite the lower courts' approval of these plans using the framework of the strict scrutiny test, we agree with the thoughtful concurring opinions authored by two respected Court of Appeals judges (Judge Kozinski of the Ninth Circuit and Chief Judge Boudin of the First Circuit) urging this Court to revisit the applicable standard of review in this narrow class of cases where local school authorities

strive to avoid replicating segregated housing patterns in the schools. *See PICS*, 426 F.3d at 1193-96 (Kozinski, J., concurring); *Comfort v. Lynn School Committee*, 418 F.3d 1, 27-29 (1st Cir.), *cert. denied*, 546 U.S. ___, 126 S. Ct. 798 (2005) (Boudin, C.J., concurring). Given the tension between the deference historically accorded to local school boards in setting education policy and the Court's application of strict scrutiny to racial classifications, some loosening of the standard of review may be warranted so that local school boards can implement congressional policy in support of racially integrated schools using similar open choice plans without the threat of costly multi-year litigation.

ARGUMENT

I. BOTH THIS COURT AND CONGRESS HAVE ESTABLISHED THE PRINCIPLE OF RACIAL INTEGRATION AT THE ELEMENTARY AND SECONDARY LEVELS OF PUBLIC EDUCATION AS A COMPELLING GOVERNMENTAL INTEREST.

Both the Seattle and Louisville school assignment plans are aimed at preserving racially integrated public schools that in both cities were once racially segregated. The school board in Louisville was subject to court-ordered desegregation for many years (*JCPS*, 330 F. Supp.2d at 840-41), while the Seattle school officials successfully desegregated their schools voluntarily (*PICS*, 426 F.3d at 1166-69).

A. This Court Has Repeatedly Stated that Local School Boards Have a Duty to Prevent Racial Segregation in Public Schools.

For more than a half century, since *Brown v. Board of Education*, 347 U.S. 483 (1954), the Court has emphasized the importance of public education as an integral component

of our democratic society and the duty of local school officials to provide each child the opportunity to receive an education on equal terms.[5] *See, e.g., id.* at 493; *Plyler v. Doe*, 457 U.S. 202, 221 (1982); *Ambach v. Norwick*, 441 U.S. 68, 76-77 (1979). In reaching the conclusion that "[s]eparate educational facilities are inherently unequal" (347 U.S. at 495), the Court reviewed such intangible considerations as "ability to study, to engage in discussions and exchange views with other students." *Id.* at 493 (quoting *McLaurin v. Oklahoma State Regents*, 339 U.S. 637, 641 (1950)). The Court had based its earlier decisions that universities could not provide separate but equal educational opportunities on these intangibles. *Ibid.* (citing *McLaurin* and *Sweatt v. Painter*, 339 U.S. 629 (1950)). The Court stated that these "considerations apply with added force to children in grade and high schools." *Id.* at 494. To separate Black children from others "solely because of their race generates a feeling of inferiority as to their status in the

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[5] The Court's words bear repeating in full:

> Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today, it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity where the state has undertaken to provide it, is a right which must be made available to all on equal terms.

347 U.S. at 493.

community that may affect their hearts and minds in a way unlikely ever to be undone." *Ibid.* With these words, the Court established as a constitutional principle under the Equal Protection Clause the goal of ending racial discrimination in the public schools. *Id.* at 495 ("Separate educational facilities are inherently unequal.")

Nevertheless, despite *Brown's* lofty goals, the Court understood that while the harms of segregation were evident, regardless of the cause of the segregation, the Court's remedial power under the 14th Amendment extended only to state-imposed segregation. The Court explained that "[s]egregation with the sanction of law, therefore, has a tendency to [retard] the educational and mental development of Negro children and to deprive them of some of the benefits they would receive in a racial[ly] integrated school system." *Id.* at 494 (quoting lower court findings).

Later cases emphasized the responsibilities of local school officials to bring about voluntary integration of schools as sound educational policy. *See Green v. County School Board*, 391 U.S. 430, 436 (1968) ("the transition to a unitary non-racial system of public education was and is the ultimate end to be brought about."). The Court's message was unambiguous: "School boards . . . then operating state-compelled dual systems were nevertheless clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch." *Id.* at 437-38. The Court's belief (and hope) was that local school authorities would take the lead in dismantling the unconstitutional system of segregated education and to achieving integrated public schools. *Id.* at 438-39.

A group of cases decided in 1971 illustrated both the breadth of the judicial power as well as its limitations. In *Swann v. Charlotte-Mecklenburg Board of Education*, 402

U.S. 1 (1971), the Court recognized that local school officials, using their broad discretionary powers in formulating education policy, like the school boards in these cases, "might conclude, for example, that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole." *Id.* at 16. At the same time, the Court acknowledged that "judicial powers may be exercised only on the basis of a constitutional violation. Remedial judicial authority does not put judges automatically in the shoes of school authorities whose powers are plenary." *Ibid.* And, most important, the Court dismissed the notion that it was impermissible for school boards to consider race in making student assignments. *Id.* at 24-25; *see also North Carolina State Bd. Of Educ. v. Swann*, 402 U.S. 43, 45 (1971) ("school authorities have wide discretion in formulating school policy, and that as a matter of educational policy school authorities may well conclude that some kind of racial balance in the schools is desirable *quite apart from any constitutional requirements.*") (emphasis added); *McDaniel v. Barresi*, 402 U.S. at 41 (the local school board, "as part of its affirmative duty to disestablish the dual school system, properly took into account the race of its elementary school children in drawing attendance lines.").

Two years later, the Court reaffirmed that local school officials have a duty to achieve integration and not merely refrain from discrimination on account of race. *Keyes v. School District No. 1*, 413 U.S. 189, 200-01 n.11 (1973). Although *Keyes* was not a case in which there had been a dual school system, the Court found that parts of the school district were in fact segregated through various devices such as design of attendance zones and school site selection. *Id.* at 203.

In a separate opinion, Justice Powell acknowledged that the cases since *Brown* had evolved toward an "affirmative-duty doctrine" so that a distinction between *de jure* and *de facto* segregation no longer made sense. *Id.* at 219-23 (Powell, J., concurring in part and dissenting in part). He proposed defining the constitutional duty imposed on local school boards as the duty to "operate *integrated school systems* within their respective districts." *Id.* at 225-26 (emphasis in original). As he explained, "Public schools are creatures of the State, and whether the segregation is state-created or state-assisted or merely state-perpetuated should be irrelevant to constitutional principle." *Id.* at 227. "[S]chool boards have a duty to minimize and ameliorate segregated conditions by pursuing an affirmative policy of desegregation." *Id.* at 236.

Perhaps, anticipating today's cases, Justice Powell explained the importance of racial diversity in public schools and made clear that school boards have discretion to go beyond constitutional minima:

> In a pluralistic society such as ours, it is essential that no racial minority feel demeaned or discriminated against and that students of all races learn to play, work, and cooperate with one another in their common pursuits and endeavors. Nothing in this opinion is meant to discourage school boards from exceeding minimal constitutional standards in promoting the values of an integrated school experience.

Id. at 242.

In sum, by the early 1970s, local school boards were under an affirmative duty to ensure that their school systems were racially integrated and had broad discretion in choosing the manner of achieving integration. However, the judicial

power to order desegregation under the Equal Protection Clause remained confined to segregation resulting in some manner from official action. If more was to be expected of the local school authorities, it would be up to Federal, state and local policymaking authorities to make that decision. *See Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 302 n. 41 (1978) (opinion of Powell, J.) (recognizing the "special competence of Congress to make findings with respect to the effects of identified past discrimination and its discretionary authority to take appropriate remedial measures.").

B. Congress Has Established as National Policy the Goals of Achieving and Maintaining Racially Integrated Public Schools.

By 1970, it became apparent that the courts alone could not achieve racially integrated schools nationwide. At a time when Congress perceived the need for Federal legislation to assist local communities in improving the quality of public education in general, Congress seized the opportunity to establish as national policy the goals of achieving and maintaining racially integrated public schools. Over the past 35 years Congress has repeatedly declared by law its commitment to school integration, student-body diversity at the earliest stage of student education, and prevention of minority isolation in public schools. These laws described below recognized that implementation of these goals was the responsibility of local school boards. To encourage voluntary action, Congress provided financial incentives for specific types of programs aimed at promoting school desegregation, particularly establishment of magnet schools. Given congressional action establishing integration of our elementary and secondary public schools as paramount national policy, that should suffice in demonstrating that these goals are compelling governmental interests.

In 1970, President Nixon recommended to Congress the enactment of what was to become the Emergency School Aid Act ("ESAA"). The ESAA was enacted in 1972, among other things, to raise student achievement by addressing *de facto* segregation. Pub. L. No. 92-318, 86 Stat. 354 (1972).[6] In proposing the ESAA, President Nixon focused on the adverse consequences of racial separation and isolation and the benefit to all students of a diverse educational environment:

> The Act deals specifically with problems which arise from racial separation, whether deliberate or not, and whether past or present. It is clear that racial isolation ordinarily has an adverse effect on education. Conversely, we also know that desegregation is vital to quality education—not only from the standpoint of raising the achievement levels of the disadvantaged, but also from the standpoint of helping all children achieve the broad-based human understanding that increasingly is essential in today's world.

H.R. Rep. No. 92-576, at 3 (1971); S. Rep. No. 92-61, at 7 (1971). As enacted, the legislation sought to reduce segregation by race in elementary and secondary schools "without regard to the origin or cause of such segregation." *Bd. of Educ. v. Harris,* 444 U.S. 130, 141 (1979) (quoting ESAA § 702 (internal quotation marks omitted)). In other words, as this Court observed, "Congress was disturbed about minority segregation and isolation as such, *de facto* as well as *de jure*, and that, with respect to the former, it intended the limited funds it made available to serve as an enticement device to encourage voluntary elimination of that kind of segregation." *Ibid.*

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[6] The ESAA was repealed and simultaneously reenacted by the Education Amendments of 1978, Pub. L. No. 95-561, 92 Stat. 2268 (1978). *See Bd. of Educ. v. Harris*, 444 U.S. 130, 132 n.1 (1979).

The ESAA was eliminated as a separate program in 1981 and consolidated with more than 30 other programs into a single block grant. Omnibus Reconciliation Act of 1981, Pub. L. No. 97-35, § 5, 95 Stat. 357 (1981). This consolidation sharply reduced available federal funds for desegregation efforts.

By 1984, the growing concern about insufficient support for voluntary desegregation led to enactment of the Magnet Schools Assistance Program ("MSAP"), Pub. L. No. 98-377, Title 7, 98 Stat. 1299 (1984). One of the central goals of the MSAP was improving student achievement through "the voluntary elimination, reduction, or prevention of minority group isolation in elementary and secondary schools." MSAP § 703, 98 Stat. 1299. In this statute, Congress again codified the goal of combating minority student isolation in our public schools.[7]

The specific goal of achieving student body diversity at the elementary school level was formally added to the statute in the 1994 reauthorization of the MSAP, Pub. L. No. 103-382, § 5101(4)(A)(ii), 108 Stat. 3690 (1994). Congress made the express finding that "it is in the best interest of the

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[7] The Solicitor General notes that for several years beginning in 1998 the Department of Education described the statutory goal of "reducing, eliminating or preventing minority group isolation through magnet schools as a compelling interest (S.G. PICS Br. at 26 (citing, *e.g.*, 63 Fed. Reg. 8021, 8022 (1998))), but that in 2004 the Department dropped the phrase "compelling interest" in restating the goal (*id.* at 26-27 (citing 69 Fed. Reg. 4990, 4992 (2004)). The Solicitor General does not claim that this omission has any legal significance and the notice gave no reason for the omission. The *Federal Register* notices invited the public to submit grant applications under MSAP; they were not rulemaking notices and hence there is no suggestion that the Department's characterization of congressional policy warrants *Chevron* deference. *See, e.g., Gonzales v. Oregon*, 546 U.S. ___, 126 S.Ct. 904, 914-15 (2006); *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001).

Federal Government to . . . continue the [Government's] support of . . . school districts seeking to foster meaningful interaction among students of different racial and ethnic backgrounds, *beginning at the earliest stage of such student's education*." MSAP § 5101(5)(a), 108 Stat. 3691 (emphasis added). Contrary to the petitioners' arguments that racial diversity may not be a compelling governmental interest below the university level (PICS Br. at 47-48; Meredith Br. at 4), Congress did not view student diversity as relevant only to higher education. Rather, Congress spoke in the clearest terms in designating student body diversity as a priority for the youngest students in the public education system.[8] Although the Act specifically focused on the significant contributions of magnet schools to "our nation's efforts to achieve voluntary desegregation in our Nation's schools," it noted that "where magnet programs are implemented for only a portion of a school's student body, special efforts must be made to discourage the isolation of . . . students by racial characteristics." MSAP § 5101(4)(A)(ii), 108 Stat. 3690. Plainly, the goals of diversity and prevention of isolation were not limited to magnet schools even if the financial grants authorized by the Act were so limited.

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[8] Nothing in *Grutter* precludes the Court from upholding the validity of Congress' determination that student diversity is a compelling governmental interest below the university level. To be sure, the Court relied on the "special niche" universities occupy under the First Amendment to justify deference to the University of Michigan Law School's assertion of a compelling interest in a diverse student body. *Grutter*, 539 U.S. at 328-29. However, in addition to its First Amendment rationale, the Court also relied on information provided by the *amici* in that case of "the educational benefits that flow from student body diversity." *Id.* at 330. The lower courts in these cases had the benefit of similar information bearing on elementary schools (in Louisville) and secondary schools (in Seattle and Louisville) and this information resulted in appropriate findings. *PICS*, 426 F.3d at 1174-77; *JCPS*, 330 F. Supp.2d at 852-54. The combination of a strong evidentiary record and congressional policymaking firmly establish student diversity in the public schools as a compelling governmental interest.

In 2001 at the urging of President Bush, Congress passed the No Child Left Behind Act ("NCLB" or the "Act"), Pub.L. No. 107-110, 115 Stat. 1394 (2002), 20 U.S.C. § 6301 *et seq.*, one of the most sweeping reforms of the U.S. educational system in 30 years. Once again, Congress focused on removing educational impediments affecting minority students. One of the Act's stated goals is "[c]losing the achievement gap between high and low performing children, especially the achievement gaps between minority and non-minority students." 20 U.S.C. § 6301(3).

In furtherance of this goal, the Act reauthorized MSAP (now for a third time) with provisions for federal financial assistance to support voluntary desegregation efforts by local jurisdictions. In doing so, as before, the Act noted that "it is in the best interests of the United States . . . to continue the Federal Government's support of . . . local educational agencies that are voluntarily seeking to foster meaningful interaction among students of different racial and ethnic backgrounds." 20 U.S.C. § 7231(a)(4)(A). Further, the Act noted that "it is in the United States' interest to ensure that all students have equitable access to a high quality education that will prepare all students to function well in a technologically oriented and a highly competitive economy comprised of people from many different racial and ethnic backgrounds." 20 U.S.C. § 7231(a)(4)(B). This congressional statement captures succinctly why student body diversity below the university level is no less a compelling governmental interest than the interest in a diverse student body at an elite law school.

The Congress that passed the NCLB was acutely aware that minority students throughout the country were often not receiving the education they needed. Given Congress' aim of advancing minority student achievement, the Act includes a number of race-conscious provisions as a means of

advancing and tracking minority student achievement. For example, the Act contemplates the possible use of race in assigning students to magnet schools, specifically exempting grant recipients acting pursuant to a plan approved by the Secretary of Education from a statutory prohibition against discrimination by race. 20 U.S.C. § 7231d(b)(2)(C)(ii). The accountability provisions require that schools separately classify and track students' progress by race and ethnicity. If schools fail to make "adequate yearly progress" in each classification, they are subject to an array of sanctions including loss of Federal funds. 20 U.S.C. §§ 6311(b)(2)(B), 6311(b)(3)(C)(xiii), 6311(g)(2). Other provisions in the NCLB require that race be considered in the distribution of Federal funds. For instance, one section authorizes the Secretary of Education to provide grants to school districts to assist them in implementing NCLB and conditions the receipt of those grants on demonstrating a broad "strategy to eliminate the achievement gap that separates low-income and minority students from other students." 20 U.S.C. § 6622(b)(2). The Act authorizes the Secretary to grant *Close Up* fellowship grants with "special consideration" given to "students with special needs including . . . minority students" (20 U.S.C. § 6494), and provides grants to school principals "who have a record of improving the academic achievement of all students, but particularly students from racial and ethnic minority groups" (20 U.S.C. § 6623).

In sum, for 35 years, Congress has repeatedly determined that racial integration of the public schools is a critical part of the nation's policies for improving minority student performance. This is what the Court first said in *Brown* (*see* pp. 6-8 *supra*), and what the Congress has repeatedly said since 1972. Encouraging school boards to voluntarily achieve and maintain integrated schools that reflect the community at-large and not merely one segment is not racial discrimination and it is not giving preferences to groups that had been disadvantaged in the past at the expense

of other students. It is simply a way of ensuring that majority and minority students jointly benefit from the cultural and ethnic diversity that is now common in the workplace, the armed services, and in many places of worship. It is preparation of young people for the experiences of life at an early age.

As Members of Congress with a strong interest in the success of the education legislative programs enacted during the past 35 years, we urge the Court to recognize that the school choice plans adopted by the Seattle and Louisville school authorities are common-sense proposals aimed at carrying out the Federal statutory policy of making racial integration of our public schools a matter of the highest priority. If the Court were to conclude that these integration plans are not constitutionally acceptable, we fear that the schools in these communities will simply become more segregated over time, reflecting the housing patterns in these and many other cities, and that in future years the newly segregated schools could become the subject of litigation and the possibility of more draconian remedies than the modest school assignment plans now before the Court.

II. THE SEATTLE AND LOUISVILLE SCHOOL CHOICE PLANS ARE NARROWLY TAILORED STUDENT ASSIGNMENT PLANS IN WHICH RACE IS ONLY ONE OF SEVERAL COMPONENTS AIMED AT MAINTAINING RACIALLY INTEGRATED PUBLIC SCHOOLS IN COMMUNITIES WITH *DE FACTO* SEGREGATED HOUSING PATTERNS.

The lower courts correctly applied strict scrutiny review despite the very significant differences between these cases and those in which this Court stated that "all racial classifications imposed by government 'must be analyzed by a reviewing court under strict scrutiny.'" *Grutter*, 539 U.S.

at 326 (quoting *Adarand*, 515 U.S. at 227). Petitioners and their *amici* fault the lower courts for adapting their analyses to reflect the particular circumstances of elementary and secondary education rather than mechanically applying the *Grutter* Court's "race-conscious university admissions" analysis to elementary and secondary schools. *Id.* at 333-34 (the narrow-tailoring "inquiry must be calibrated to fit the distinct issues raised by the use of race to achieve student diversity in public higher education."). The courts below followed this Court's "teaching that the very purpose of strict scrutiny is to take such relevant differences into account." *Id.* at 334 (internal quotation marks omitted) (quoting *Adarand*, 515 U.S. at 228). We address in this section some of the petitioners' objections that could affect voluntary school integration plans in general.

A. PICS is especially critical of what they believe is the Seattle plan's failure to give individual consideration to each student's contribution to diversity. PICS Br. at 44-45. They are joined in this argument by the Solicitor General. S.G. PICS Br. at 19-21. While acknowledging the Ninth Circuit's explanation that the selective admission process typical of university admissions is not typical of elementary and secondary school admissions, the United States nevertheless asserts that where individualized consideration is not relevant to a particular use of race, its omission from the narrow tailoring analysis would, in effect, "threaten[] to read the Equal Protection Clause out of the Constitution." *Id.* at 21 (quoting *PICS*, 426 F.3d at 1210 (Bea, J., dissenting)).

That argument, we believe, misreads what the Court explained in *Grutter* was the importance of individualized consideration in the context of selective admissions at the university level. Because the law school admission process was one in which applicants compete with one another for a limited number of seats based on a range of qualifications, the Court sought to assure that no racial or ethnic group

would be insulated from competition in the admission process. 539 U.S. at 334 (citing *Regents of Univ. of Cal. v. Bakke*, 438 U.S. at 315-16 (opinion of Powell, J.)). For that reason, race could be a plus factor but could not replace the range of qualifications considered for admission in a process that is already highly individualized. *Ibid.*; *see Gratz v. Bollinger*, 539 U.S. 244, 271-72 (2003) (the "automatic distribution of 20 points has the effect of making 'the factor of race . . . decisive' for virtually every minimally qualified underrepresented minority applicant.").

In the Seattle school choice program, race is a plus factor at only the oversubscribed high schools where there exists a danger of racial isolation. All the other criteria used for school assignments still apply. A vast majority of students would be assigned to a particular school based on student choice, the first factor to be considered. If a school is oversubscribed, the second step is to implement the tiebreaker for applicants with siblings already attending the school. The racial factor is only triggered at the third step and only to the extent of ensuring a critical mass of minority students (no greater than 15% above or below the percentage in the total school population).[9] Once the school achieves a critical mass, the racial factor no longer applies.[10] In short, *Grutter* and *Bakke* do not require schools without a competitive admission process to establish individualized criteria that would otherwise be inapplicable when race is to be a factor in the admission process. Rather, it is a directive

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[9] The mix of the existing student body and the incoming class are legitimate factors in determining when the racial factor is triggered. *See Gratz v. Bollinger*, 539 U.S. 244, 279 (2003) (O'Connor, J., concurring) (citing *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 317-18 (1978) (opinion of Powell, J.)).

[10] Indeed, even if the minority ratio at a school dropped below the percentage deemed to constitute a critical mass due to transfers or other circumstances, the racial factor would not be reinstated in the middle of the school year or in later grades. *See PICS*, 426 F.3d at 1170.

APPENDIX

The following Members of the United States House of Representatives join in submitting this brief as *amici curiae* in support of respondents:

Rep. Jim McDermott (Washington)*
Rep. John Conyers, Jr. (Michigan)
Rep. Danny K. Davis (Illinois)
Rep. Raúl M. Grijalva (Arizona)
Rep. Rubén E. Hinojosa (Texas)
Rep. Michael M. Honda (California)**
Rep. Sheila Jackson Lee (Texas)
Rep. Betty McCollum (Minnesota)
Rep. George Miller (California)
Rep. Major R. Owens (New York)
Rep. Linda Sánchez (California)
Rep. Maxine Waters (California)
Rep. Melvin L. Watt (North Carolina)***
Rep. Robert I. Wexler (Florida)
Rep. Lynn Woolsey (California)

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* Rep. McDermott's congressional district includes most of the Seattle School District No. 1.

** Rep. Honda is joining in this brief on behalf of the 11 Members of the Congressional Asian Pacific American Caucus.

*** Rep. Watt is joining in this brief on behalf of the 43 Members of the Congressional Black Caucus.

APPENDIX

(Kozinski, J., concurring).[15] If, as we urge, the Court affirms the Sixth and Ninth Circuits in these cases, other communities adopting similar open choice assignment plans should not have to endure the lengthy litigation hurdles of strict scrutiny that Seattle and Louisville have had to endure.

CONCLUSION

The judgments of the Courts of Appeals for the Sixth and Ninth Circuits should be affirmed.

Respectfully submitted,

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[15] Judge Kozinski noted that the *PICS* case has "taken over five years so far, generating 11 published opinions from the 24 judges who have considered the matter in the federal and state courts." An entire class has completed its four years of high school education without ever having been affected by the plan. *PICS*, 426 F.3d at 1195 (Kozinski, J., concurring).

Ibid. (citation omitted; italics in original). Justice Ginsburg interpreted this response as establishing a dual standard under the rubric of "strict scrutiny" in which the standard is likely to be "'fatal' for classifications burdening groups that have suffered discrimination in our society" but "dispelled the notion that 'strict scrutiny' is 'fatal in fact'" for a classification aimed at achieving a racially unified society. *Id.* at 275 (Ginsburg, J., dissenting).

One can readily understand the Court's initial skepticism in adjudicating the constitutional validity of these actions at a time not too long ago when governmental race-based actions were often of doubtful validity. Strict scrutiny may have been necessary at the time to "smoke out" the invidious classification masquerading as benign. *See Richmond v. J.A. Croson Co.*, 488 U.S. at 493 (plurality opinion). Today, however, Congress has spoken in unambiguous terms to establish as paramount national policy the goal of achieving fully integrated public schools, providing a racially diverse classroom experience for our children as training for a racially diverse workplace experience, and assuring to the extent practical that no minority suffer the educational disadvantages of racial isolation in our schools. *See* pp. 11-17 *supra*. If ever there was a compelling governmental interest first identified by this Court (*see* pp. 6-11 *supra*) and later expanded by our elected branches, this is it. It is true, of course, that implementation and fine-tuning of the policy occur at the local level. Strict scrutiny, with its hostile verbiage, almost inevitably means that local school boards that "step up to the plate" to make difficult decisions on how to bridge a racial divide in their school systems and propose a solution that includes some consideration of race in the mix of assignment factors face multi-year litigation with "incentives for the parties to bloat the record with depositions, expert reports, exhibits, documents and various other materials they hope will catch the eye of the judges who ultimately decide the issue." *PICS*, 426 F.3d at 1195

> inclusion. . . . Actions designed to burden groups long denied full citizenship stature are not sensibly ranked with measures taken to hasten the day when entrenched discrimination and its aftereffects have been extirpated.

Id. at 301 (Ginsburg, J., dissenting) (citations omitted). Justice Ginsburg reaffirmed her view in *Johnson v. California*, 543 U.S. at 516 (Ginsburg, J., concurring). In the same case, faced with an apparent conflict between the Court's declaration that "*all* racial classifications reviewable under the Equal Protection Clause must be strictly scrutinized" and case law that applied a deferential standard of review "to *all* circumstances in which the needs of prison administration implicate constitutional rights," Justice Thomas, joined by Justice Scalia, "deferred to the reasonable judgments of officials experienced in running this Nation's prisons." *Id.* at 524 (Thomas, J., dissenting) (italics in original).

Perhaps the debate among the Members of this Court is more about the label placed on the standard of review than on the degree of deference to accorded to school officials. In responding to Justice Stevens' dissent in *Adarand*, Justice O'Connor, writing for the Court, insisted that "strict scrutiny *does* take relevant differences into account—indeed, that is its fundamental purpose." *Adarand*, 515 U.S. at 228 (internal quotation marks omitted; italics in original). She went on to explain:

> Strict Scrutiny does not "trea[t] dissimilar race-based decisions as though they were equally objectionable," . . .; to the contrary, it evaluates carefully all governmental race-based decisions *in order to decide* which are constitutionally objectionable and which are not.

opportunities of others or interfere too harshly with legitimate expectations of persons in once-preferred groups." *Gratz*, 539 U.S. at 302 (Ginsburg, J., dissenting) (internal quotation marks omitted) (quoting *Adarand*, 515 U.S. at 276 (Ginsburg, J., dissenting)).

The Court itself has engaged in a vigorous debate for several years on whether strict scrutiny is truly necessary in all cases involving official racial classifications. As noted earlier, a majority of the current Court at one time or another has suggested a departure from strict scrutiny in reviewing benign race-based programs or where case law establishes a strong tradition of deference to a governmental official's actions within his area of responsibility. For example, in *Adarand*, Justice Stevens expressed his concerns with applying the label "strict scrutiny" to benign race-based programs. He explained that this

> label has usually been understood to spell the death of any governmental action to which a court may apply it. The court suggests today that "strict scrutiny means something different—something less strict—when applied to benign racial classifications. Although I agree that benign programs deserve different treatment than invidious programs, there is a danger that the fatal language of "strict scrutiny" will skew the analysis and place well-crafted benign programs at unnecessary risk.

515 U.S. at 243-44 n.1 (Stevens, J., dissenting). In *Gratz*, Justice Ginsburg, joined by Justices Souter and Breyer, criticized the Court's application of the same standard of review for all official race classifications. 539 U.S. at 298 (Ginsburg, J., dissenting). She stated that

> government decisionmakers may properly distinguish between policies of exclusion and

maintaining segregated schools, but the Jefferson County Board was further along than the *McDaniel* Board in ridding itself of its discredited past. The scope of local school authority discretion should not differ in seeking to achieve an integrated school system and seeking to maintain an integrated system already achieved. *See JCPS*, 330 F. Supp.2d at 851 ("It would seem rather odd that the concepts of equal protection, local control and limited deference are now only one-way streets to a particular educational policy, virtually prohibiting the voluntary continuation of policies once required by law.").

What both Judge Kozinski and Chief Judge Boudin stress is that the merits of such school choice plans, with a racial component aimed at promoting racial integration and avoiding racial imbalance, are legitimate subjects of debate "left to legislatures, city councils, school boards and voters." *Comfort*, 418 F.3d at 28 (Boudin, C.J., concurring); *see also PICS*, 426 F.3d at 1194 (Kozinski, J. concurring) ("Through their elected officials, the people of Seattle have adopted a plan that emphasizes school choice, yet tempers such choice somewhat in order to ensure that the schools reflect the city's population."); *id.* at 1195 ("there is much to be said for returning primacy on matters of educational policy to local officials.").[14] Rational-basis review would allow "different communities [to] try different solutions to common problems and gravitate toward those that prove most successful or seem to them best to suit their individual needs." *Comfort*, 418 F.3d at 28 (Boudin, J., concurring) (citing *United States v. Lopez*, 514 U.S. 549, 581 (1995) (Kennedy, J., concurring)). And it would not prevent "careful judicial inspection" to ensure that the race-based component stayed within reason so as not "to trammel unduly upon the

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[14] *See also Washington v. Seattle School District No. 1*, 458 U.S. 457, 474 (1982) ("in the absence of a constitutional violation, the desirability and efficacy of school desegregation are matters to be resolved through the political process.").

integration and the presumption of constitutional error implicit in the strict scrutiny standard.[12] *Compare, e.g., Swann*, 402 U.S. at 16 (referring to broad discretionary powers of school authorities "whose powers are plenary"), *with Adarand*, 515 U.S. at 223-24 (quoting prior cases using such phrases as "inherently suspect", constitutionally suspect", and "odious to a free people"). Although one petitioner and the Solicitor General argue that race-based assignments are only permissible as judicial remedies to proven constitutional violations,[13] the cases do not support that position. *See Grutter*, 539 U.S. at 328 ("we have never held that the only governmental use of race that can survive strict scrutiny is remedying past discrimination.").

In *McDaniel v. Barresi*, 402 U.S. 39 (1971), the Court upheld a race-conscious voluntary program developed by local school officials to replace a student assignment system that had not previously been the subject of judicial review. Writing for a unanimous Court, Chief Justice Burger emphasized the breadth of the school authority's discretion and made no reference to the strict scrutiny test. *Id.* at 40-42. To be sure, *McDaniel* involved the voluntary effort by the local Board of Education in Clarke County, Georgia, to dismantle a dual school system. *Id.* at 41. The Jefferson County Board of Education had also maintained a dual school system that had previously been adjudicated in violation of the 14th Amendment, but at the time it adopted the plan at issue in this case, it had achieved a unitary school system. *See JCPS*, 330 F. Supp. 2d at 841. Thus, like Clarke County in *McDaniel*, Jefferson County had a history of

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[12] Both the Ninth Circuit and the Kentucky District Court cited to numerous decisions of this Court that stressed the vital nature of local control of public education and the substantial deference owed to these local officials in formulating educational policy for their communities. *See PICS*, 426 F.3d at 1188 n.33; *JCPS*, 330 F. Supp.2d at 850-51 and cases cited therein.

[13] *See* PICS Br. at 25-26; S.G. PICS Br. at 10; S.G. Meredith Br. at 10.

> races, and no race is given a preference over another. That a student is denied the school of his choice may be disappointing, but it carries no racial stigma and says nothing at all about that individual's aptitude or ability. The program does use race as a criterion, but only to ensure that the population of each public school roughly reflects the city's racial composition.

426 F.3d at 1194. Chief Judge Boudin made a similar point in describing the school assignment plan for Lynn, Massachusetts (quoted by Judge Kozinski, *id.* at 1193):

> The Lynn plan . . . is fundamentally different from almost anything that the Supreme Court has previously addressed. It is not, like old-fashioned racial discrimination laws, aimed at oppressing blacks, . . . nor, like modern affirmative action, does it seek to give one racial group an edge over another (either to remedy past discrimination or for other purposes) . . . . By contrast to *Johnson v. California*, 543 U.S. 499, 125 S. Ct. 1141, 160 L.Ed.2d 949 (2005), the plan does not segregate persons by race. . . . Nor does it involve racial quotas.

Comfort, 418 F.3d at 27 (Boudin, C.J., concurring) (citations omitted). Because of these differences between the Seattle plan and the cases in which this Court has applied strict scrutiny in the past, Judge Kozinski proposed a "robust and realistic rational basis review" modeled on *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432 (1985). *PICS*, 426 F.3d at 1194 (Kozinski, J., concurring).

There is obvious tension between the many cases that emphasize the importance of deferring to the educational judgment of local school officials seeking to achieve school

e.g., *Johnson v. California*, 543 U.S. 499, 505-06 (2005); *Grutter*, 539 U.S. at 326; *Adarand*, 515 U.S. at 227; *Shaw v. Reno*, 509 U.S. 630, 650 (1993). Yet this uniformity of decision has not masked the doubt expressed by a majority of the present Court as to the suitability of the strict scrutiny standard in reviewing the legitimacy of some governmental actions based on race. *See*, *e.g.*, *Johnson v. California*, 543 U.S. at 516 (Ginsburg, J., joined by Souter and Breyer, JJ., concurring); *id.* at 524 (Thomas, J., joined by Scalia, J., dissenting); *Gratz*, 539 U.S. at 298-302 (Ginsburg, J., joined by Souter and Breyer, JJ., dissenting); *Adarand*, 515 U.S. at 243-49 (Stevens, J., joined by Ginsburg, J., dissenting).

Now, two respected Court of Appeals judges, one of whom, Judge Kozinski, who concurred in the en banc Ninth Circuit's judgment upholding the Seattle plan, have urged this Court to revisit the applicable standard of review in cases such as these in which local school authorities seek to ensure racially integrated public schools in communities with highly segregated housing patterns. *See PICS*, 426 F.3d at 1193-96 (Kozinski, J., concurring); *Comfort v. Lynn School Committee*, 418 F.3d 1, 27-29 (1st Cir.), *cert. denied*, 546 U.S. ___, 126 S. Ct. 798 (2005) (Boudin, C.J., concurring).[11] According to Judge Kozinski, the Seattle plan

> is not meant to oppress minorities, nor does it have that effect. No race is turned away from government service or services. The plan does not segregate the races; to the contrary, it seeks to promote integration. There is no attempt to give members of particular races political power based on skin color. There is no competition between the

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[11] Recent legal commentary urges a similar reexamination of the appropriate standard of review. *See*, *e.g.*, James Nial Robinson II, *Trying to Push a Square Peg through a Round Hole: Why the Higher Education Style of Strict Scrutiny Review Does Not Fit When Courts Consider K-12 Admissions Programs*, 2004 B.Y.U. Educ. & L.J. 51.

("Justice Kennedy cited Amherst College, which admitted between about 8.5% ... and 13.2% ... minority applicants over a ten-year period, as an example of a range not suggestive of a quota" (citing 539 U.S. at 391 (Kennedy, J., dissenting)). The District Court found that "the range in the percentage of Black students among all JCPS schools is much broader than the range in minority admissions at either Amherst College or Michigan Law School." *Ibid.* (footnote omitted).

For the same reasons, the record is plain that the school boards are not seeking to achieve some racial balance "for its own sake." *Richmond v. J.A. Croson Co.*, 488 U.S. at 494. The establishment of wide ranging goals intended to ensure the compelling interest of racially integrated schools, student diversity, and avoidance of racial isolation are inconsistent with guaranteeing a specific percentage of seats in the schools to particular racial minority groups, which is what this Court has described as "outright racial balancing." *Grutter*, 539 U.S. at 330. Once those goals have been achieved, race no longer is a consideration in student assignments.

III. THE COURT SHOULD DETERMINE WHETHER STRICT SCRUTINY IS AN UNDULY RESTRICTIVE STANDARD OF REVIEW WHEN LOCAL SCHOOL AUTHORITIES VOLUNTARILY SEEK TO ACHIEVE OR MAINTAIN PUBLIC SCHOOL INTEGRATION IN COMMUNITIES IN WHICH HOUSING PATTERNS ARE *DE FACTO* SEGREGATED.

Since the Court announced the strict scrutiny standard in racial classification cases in 1989 (*see Richmond v. J.A. Croson Co.*, 488 U.S. at 493-94 (plurality); *id.* at 520 (Scalia, J., concurring in judgment)), the Court has consistently reaffirmed its applicability to all such classifications. *See*,

reserved exclusively for certain minority groups." 539 U.S. at 335 (internal quotation marks omitted) (quoting *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (plurality opinion)). No fixed number of positions has been reserved for minority students either in Seattle or in Louisville. *PICS*, 426 F.3d at 1184-85; *JCPS*, 330 F. Supp.2d at 856-57. What each school district seeks to achieve is a critical mass of underrepresented minority students where student choice leaves certain schools with too few minority students using a percentage range based on the demographics of the school district. "The . . . goal of attaining a critical mass of underrepresented minority students does not transform its program into a quota." *Grutter*, 539 U.S. at 335-36.

As noted earlier, the Seattle plan uses the 15% plus or minus range from the overall percentage of the racial groups' population in the school district to determine when one or the other group is considered to be racially isolated and hence lacking a critical mass at an oversubscribed school. *PICS*, 426 F.3d at 1185. Once a critical mass is achieved at a particular school, the racial tiebreaker ceases to operate and it does not apply to student transfers after the ninth grade. *Id.* at 1170; *see* note 10 *supra*.

The Jefferson County Board's goal is to achieve a minority population ranging between 15% and 50% at each school, with the actual minority population ranging widely within that broad goal. *JCPS*, 330 F. Supp.2d at 857. The District Court inferred that "[t]his wide fluctuation suggests a lesser use of race and the absence of a specific target." *Id.* at 858. The court compared the Louisville statistics with those from the University of Michigan Law School, cited in *Grutter*, and with those from Amherst College, cited by Justice Kennedy in his dissent. *Id.* at 857 ("Justice O'Connor called the Michigan Law School's percentage of minority students, which varied from 13.5% and 20.1%, 'a range inconsistent with a quota'" (citing 539 U.S. at 336)); *ibid.*

that race not trump otherwise applicable admission criteria though it may be part of the mix with flexibility in how to weigh the various factors. *See Grutter*, 539 U.S. at 334 (prohibiting universities from putting various racial groups on separate admission tracks); *Bakke*, 438 U.S. at 317-18 (opinion of Powell, J.) (describing flexible admission program that places all applicants on the same footing but allows a different weight to be given to each factor, including race or ethnic background).

The Louisville plan works in a similar way. According to the District Court that reviewed the plan, "Many factors determine student assignment, including address, student choice, lottery placement, and, at the margins, the racial guidelines. But race is simply one possible factor among many, acting only occasionally as a permissible 'tipping' factor in most of the JCPS assignment process." *JCPS*, 330 F. Supp.2d at 859. The fact that race may make a difference in particular cases does not mean that the other factors that determine school assignments were not considered. *See Grutter*, 539 U.S. at 339 (citing *Bakke*, 438 U.S. at 316 (opinion of Powell, J.)). The Court's approval of race as one of many factors would be meaningless if the Court were ultimately to hold that whenever race made a difference, its use was invalid.

B. Petitioners and their *amici* accuse the school boards of setting up a quota system and engaging in racial balancing. *See, e.g.*, PICS Br. at 25-29, 43-44; S.G. PICS Br. at 15-18, Meredith Br. at 5, 7. Again, the lower courts looked to this Court's *Grutter* opinion for guidance on whether the Seattle and Louisville assignment plans constitute impermissible quotas or permissible goals and whether the school boards engaged in unconstitutional racial balancing.

According to *Grutter*, a quota is "a program in which a certain fixed number or proportion of opportunities are